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ABSTRACT

There is very little consensus among Cross Examination Debate Association (CEDA) coaches as to the assignment of presumption in value topic debate. There are really three types of presumption: (1) an identification with the status quo (existing institutions), (2) a psychological state (prevailing opinion), and (3) a decision rule (who must prove). In courts of law and traditional policy debate, these three types wear one face, but in debating propositions of value they sometimes conflict. The view that presumption adheres to the status quo is often inapplicable to value topic debates, either because there is no clear status quo or because the topic is worded so as to place the affirmative in defense of the present system. Although psychological presumption may well be argued in a value debate, it cannot provide an unambiguous tie breaker. On the other hand, a decision rule that "one who asserts must prove" provides a clear-cut guide to deciding a tied round, regardless of the wording of the resolution or the psychology of the audience. It provides the best form of presumption for the value topic debate. (JL)

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Presumption in Value Topic Debate: The Three Faces of Eve

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Presumption in Value Topic Debate:

The Three Faces of Eve

On June 21, 1982 a jury in Washington, D.C., found John Hinckley, Jr., "not guilty by reason of insanity," of the attempted assasination of President Ronald Reagan. A possible factor in the surprising verdict was the federal requirement that "the prosecution must prove 'beyond a reasonable doubt' that the defendant was legally sane at the time of the crime. . . . This put the burden of proof on the prosecution."[1] Once the insanity plea was invoked, there was a presumption that Hinckley was not sane, unless the prosecution could prove otherwise.

Approximately nine months earlier, in October of 1981, I was attending a workshop on CEDA*debating. The topic for that fall semester was to be, "Resolved: that unauthorized immigration into the U.S. is seriously detrimental to the U.S." One well respected forensic coach was confident that the affirmative had presumption on this topic and that the negative would face the burden of proof. As a relatively new CEDA coach, I found that statement puzzling. As I was to learn during the coming season, there was and is very little consensus among CEDA coaches as to the assignment of presumption in value topic debate.

* Cross Examination Debate Association

The common denominator in these two disparate events was the notion of presumption, and the correlative concept of burden of proof. In an argumentative dispute, who should enjoy presumption and who must assume the burden of proof? In traditional policy topic debate this question is rarely disputed. Textbooks advise that "the proposition should give the burden of proof to the affirmative. . . . A properly phrased proposition . . . always gives presumption to the negative."[2] In the ever growing practice of value topic debate, particularly through CEDA, the assignment of presumption remains a significant unresolved question. This essay is an attempt to clarify the rather slippery notion of presumption as it applies to value topic debate.

Traditionally, our view of presumption has been based on Whately's definition:

> [A] "Presumption" in favour of any supposition means, not . . . a preponderance of probability in its favour, but, such a pre-occupation of the ground, as implies that it must stand good till some sufficient reason is adduced against it; in short, that the Burden of proof lies on the side of him who would dispute it.[3]

Whately goes on to indicate that presumption exists in favor of existing institutions, the innocence of accused persons or books, and prevailing opinion.[4] As the concept of presumption is examined more closely, however, at least three distinct types are involved. Rather than a monolithic concept, presumption

resembles the multiple personalities of Eve.[5] Like Eve's different "faces," presumption's different meanings may be in conflict. Presumption's first "face" is its identification with the status quo--existing institutions. Second, presumption is a psychological state--a prevailing opinion.[6] Third, presumption provides a decision rule, "that he who asserts must prove."[7] While all three "faces" may frequently appear as one, this is not always the case. The frequent coincidence of all three types of presumptions falling on the same side in many disputes masks important distinctions.

In a court of law, for example, all the "faces" of presumption wear the same mask. The existing state of affairs is that the defendant is innocent until proven guilty. Great care is exercised in selecting a jury that does not have a psychological presumption of the defendant's guilt. A clear decision rule exists: if the prosecution fails to uphold its burden of proof, the defendant is to be acquitted.

In traditional policy debate, the same happy coincidence normally occurs. Topics are worded so that the affirmative must attack the status quo. Judges are trained critics who are expected to suspend any prejudices they may have about the topic, and not allow their psychological presumption to affect their decision. A decision rule is stipulated, "A tie is thus impossible in debate. . . . If the judge discerns that both teams have done an equal job, he or she must render a decision for the negative because the affirmative has failed to carry its burden of proof."[8]

These happy coincidences, however, do not always exist. In the Hinckley case, for example, although there was a legal presumption that Hinckley was not sane, the uproar following the jury's verdict indicates that the prevailing opinion--the psychological presumption--was quite the opposite. A poll by ABC news found that 75 percent of its sample disagreed with the verdict.[9] In fact, two jurors apparently believed Hinckley guilty despite their verdict.[10] Nevertheless, the jury followed a decision rule that required a verdict of not guilty by reason of insanity, because the prosecution could not prove Hinckley sane.

A similar problem often exists in debating propositions of value. On some topics, the concept of status quo may not even apply. In other cases, both teams may lay claim to the preoccupation of ground--or at least part of it. On the unauthorized immigration topic, for example, the domain of the status quo was unclear. I suspect the forensic coach referred to earlier based his view, that the affirmative had presumption, on the fact that the present system assumed that illegal immigration was detrimental, or it wouldn't be against the law. Furthermore, psychological presumption could be assigned to the affirmative, since few Americans were likely to support illegal entry into the U.S. Nevertheless, negative teams could and did argue that the status quo tacitly favored illegal immigration, because it was essential to industries such as agriculture. Furthermore, psychological presumption might be found in the notion that America was a land of immigrants,

with a tradition of welcoming the world's "tired, poor, and huddled masses." Neither psychological presumption nor the domain of the status quo provided a clear decision rule for debate on this topic.

Some recent CEDA topics have appeared to actually place the affirmative on the side of the status quo. The 1979 topic, "Resolved: that a U.S. foreign policy significantly directed toward human rights is desirable," for example, seemed to describe President Carter's existing policy. Another topic, "Resolved: that the protection of the natural environment is a more important goal than the satisfaction of America's energy needs," pitted two conflicting status quo goals against each other. Propositions of value, at least as developed in the context of CEDA debate, frequently do not lead to a uniform face of presumption.

The difficulty of assigning presumption on value topics lies with conceptualizing presumption as a single, unified entity. To untangle the confused meanings, we must first recognize the multiple dimensions of presumption and then avoid confusing attributes of one type with those of another. Thus, while no one would deny that psychological presumption exists, it will not necessarily favor the status quo. Depending on the wording of the proposition, the negative may or may not support the status quo. In some cases, neither psychological presumption nor the domain of the status quo may correspond with the decision rule that one who asserts must prove. To

clarify the role of presumption in value topic debate, each type must be examined in detail. Such an examination will prove useful in establishing which type of presumption should be granted primacy when conflict among the "three faces" occurs.

The view that presumption adheres to the status quo is often inapplicable to value topic debates, either because there is no clear status quo or because the topic is worded so as to place the affirmative in defense of the present system. Suppose an affirmative team began the debate by stating, "Since we support the status quo, and therefore have presumption, it is incumbent upon the negative to present a prima facie case as to why we should abandon the status quo. Until they present such a case, you must support the affirmative." The speaker could then sit down and, should the negative not be prepared to present such a case, the affirmative would win by default. I suspect few judges would vote for an affirmative team under these circumstances. The difficulty lies in equating presumption in favor of the status quo with a decision rule for a debate in which neither side proves its case. Based on the rule that one who asserts must prove, this round ought to be awarded to the negative, since they did not initiate the dispute. Of course, framers of value propositions can and should avoid this difficulty by either assigning the status quo to the negative or avoiding topics that deal with public policy values entirely. This is essentially the point made when Barbara

Warnick argues that "framers of propositions for value debate should so word a value propocition as to cause a change in the value assignation to be applied to the evaluatum."[11] While this is sound advice, our experience with propositions that fail to heed it leads to an important distinction: status quo presumption and decision rule presumption are not necessarily the same thing.

The case for a psychological view of presumption is made by J. Michael Sproule. He views "the audience as the ultimate agency that assigns potentially innumerable presumptions . . ."[12] Zeuschner and Hill argue for the adoption of this view in value topic debate:

> The affirmative and the negative sides of a value debate would be called upon to research and defend the claim that they . . . represent the dominant or prevailing opinions in society. As such, the value they defend should be accorded psychological presumption. Therefore, in a close debate, <u>all else being equal, the judge is given a tie breaking tool, psychological presumption</u>.[13]

It is signicant that Zeuschner and Hill attribute to psychological presumption an important quality of decision rule presumption--serving as a tie breaking tool. Unfortunately, psychological presumption cannot provide a clear cut decision rule in a tied debate, since both teams may be equally convincing on

the issue of which side represents the prevailing public opinion. While psychological presumption may well be argued in a value debate, it cannot provide an unambiguous tie breaker.

Another aspect of psychological presumption is suggested by Zeuschner and Hill:

> Sproule suggests, based on the writings of Whately, that "advocates should use presumption as a tool of audience analysis." The side best able to adapt and appeal to the value system of a given judge, and which presents the superior arguments and evidence can be said to have <u>earned</u> psychological presumption.[14]

This approach raises both practical and theoretical problems. How does one determine the value system of a single judge or a panel of judges? Is it fair to require teams potentially to write as many cases as there are individual judges? Moreover, even if one were to know the value system of a given judge, it is likely in an educational debate that judges will intentionally suspend their own values. As Freeley notes, judges "must never require the students to debate <u>them</u> rather than the opposing team."[15] Finally, the educational value of a decision rule which stipulates, "when the debate is close, vote for the side you agree with," is questionable at best. Zeuschner and Hill seem to recognize this with their caveat about arguments and evidence. However, since psychological presumption is offered to decide tied debates, presumably arguments and evidence will be virtually equal on both sides.

Clearly psychological presumption and status quo presumption may be factors in any given value topic debate. However, these types of presumption are distinct from decision rule presumption. If we seek a consistent and unambiguous decision rule, we must turn to the third face of presumption, that one who asserts must prove.

Use of a decision rule that places presumption against the resolution is a keystone of David Zarefsky's hypothesis-testing paradigm: "[A] presumption is stipulated to lie against the proposition in dispute, and the overturning of that presumption is a necessary condition for the affirmation of the proposition."[16] Jan Vasilius has endorsed this approach to value proposition debate, as have others.[17] It is not necessary to endorse the controversial hypothesis-testing paradigm, however, to accept a decision rule concept of presumption. In 1966, well before Zarefsky developed his model, Gary Cronkhite wrote:

> Specifically, the thesis to be developed here is that the onus probandi accrues to the party who initiates a dispute, and that party, in initiating the dispute, automatically awards the presumption to the position which he assails. . . . "Occupation of the ground" or existence as the status quo is only a frequently accompanying characteristic of the position accorded presumption.[18]

The rule that one who asserts must prove provides a clear-cut guide to deciding a tied round, regardless of the wording of the

resolution or the psychology of the audience. The limitation of the other types of presumption is that they cannot serve as decision rules. The natures of the status quo or prevailing public opinion are always themselves subject to debate. If such issues are not clearly resolved, the judge will be left with no way to decide a tie. It is also conceivable that the status quo could fall to one side of the debate and prevailing opinion to the other. While I recognize that presumption can exist in all three forms, it is the decision rule mode of presumption that provides the best "face" for value topic debate.

Against this position, advocates of psychological presumption may argue that they provide a closer approximation of "real world" debate. Certainly debates both in and out of academia must recognize and adapt to audience presumptions and prejudices. To base a decision rule on these factors, however, ignores an important psychological dimension of the decision rule "face" of presumption. It is important to an observer's perception of reality which party in a dispute is seen as the initiator and which is the respondent. Paul Watzlawick explains, "Ordering sequences in one way or another creates what, without undue exaggeration, may be called different realities."[19] A recent example would be the Falklands dispute. To the British, the dispute began when Argentina seized the islands. To the Argentines, however, the dispute began over a century ago when the British were believed to have usurped Argentina's rightful claim on the islands. In Watzlawick's terms, each side "punctuated" the

dispute differently. In a debate, by requiring someone to present a case for the proposition, a psychological presumption is implied against it. Why else would such a case be required? Thus, psychological presumption is not only a pre-existing state of mind, it may also be a consequence of the assignation of sides in an argumentative dispute. Whately himself recognized this possibility, when he wrote:

> Let any one imagine a perfectly unsupported accusation of some offence to be brought against himself; and then let him imagine himself--instead of replying (as of course he would do) by a simple denial, and a defiance of his accuser to prove the charge,--setting himself to establish a negative,--taking on himself the burden of proving his own innocence, by collecting all the circumstances indicative of it that he can muster: and the result would be, in many cases, that this evidence would fall far short of establishing a certainty, and might even have the effect of raising a suspicion against him;[20]

Whately apparently recognized that taking upon oneself the burden of proof could have psychological effects on the presumptions held by others.

The situation described by Whately seems to have become commonplace as a result of "post-Watergate morality." There seems to be a tendency to accept the accusation of wrong-doing as a prima facie case against the accused. Today public

officials are expected to rebut even the flimsiest of accusations. Even after extensive investigations determine that insufficient evidence exists to support prosecution, public officials, such as Labor Secretary Raymond Donovan, are hounded by calls for resignation.[21] We do our student debaters a service by instilling in them the principle that one who asserts must prove. As Wayne Brockriede notes, a key characteristic of argument is "a willingness to risk confrontation of a claim with peers."[22] Our students should learn that to initiate a dispute--whether about policies, values, or persons--is to assume a risk and a burden to prove what is asserted, regardless of prevailing public opinion or existing institutions.

In addition to the theoretical justification of granting primacy to the decision rule "face" of presumption, there are some very pragmatic advantages to doing so. First, it provides a clear and consistent rule for students to follow. It is no more reasonable to expect debaters, many of them beginners, to debate the ground rules of presumption in a debate, than to expect football players to debate the number of points for a touchdown. We ought to be able to assure our students that when they are on the negative they have presumption and that when they are on the affirmative they have the burden of proof. Second, the current format for CEDA debate gives the affirmative both first and last speaking positions. If they do not have the burden of proof, it is unfair to give them both positions. Furthermore, it makes

little sense to impose the burden of proof on the negative, but require them to wait for the affirmative to set the boundaries of the debate in the first speech. If CEDA debate abandons the traditional allocation of presumption, it also ought to abandon the traditional format designed with this allocation in mind. Finally, we should recognize that many of our students will go on to law school and become attorneys, judges, or law makers. A model of presumption that is congruent with the legal model best suits a significant element of our student debater population.

Although it may seem a far cry from the controversial courtroom of the Hinckley trial to the classroom where college debates occur, both situations share a common concern with the notion of presumption. Presumption is not a monolithic concept, but actually three different "faces." Presumption adheres to the status quo, is a psychological state, and provides a decision rule. At times all three"faces" are united, but sometimes they are in conflict. When debating value topics such a conflict is often present. Based on the analysis in this essay, primacy should be given to the decision rule, that one who asserts must prove. Regardless of the wording of the topic or the status of prevailing opinion, the initiator of an argument--the affirmative--ought always to have the burden of proof. If we adhere to this clear and consistent rule, we will do ourselves, the forensic community, and our students a great service.

NOTES

[1]"Insane on All Counts," Time, 5 July 1982, p. 25.

[2]Fred B. Goodwin, "The Process of Analysis," in Introduction to Debate, eds. Carolyn Keefe, Thomas B. Haste, and Laurence E. Norton (New York: Macmillan, 1982), pp. 63-64. Italics omitted.

[3]Richard Whately, Elements of Rhetoric, ed. Douglas Ehninger (Carbondale: Southern Illinois University Press, 1963), p. 112.

[4]Whately, pp. 114-115. See also J. Michael Sproule, "The Psychological Burden of Proof: On the Evolutionary Development of Richard Whately's Theory of Presumption," Communication Monographs, 43 (1976), 118.

[5]C.H. Thigpen and H.M. Cleckley, The Three Faces of Eve (New York: McGraw-Hill, 1957).

[6]See Sproule, pp. 115-129.

[7]Barbara Warnick, "Arguing Value Propositions," Journal of the American Forensic Association, 18 (1981), 114. My classification of types of presumption differs somewhat from that found in Ronald J. Matlon, "Debating Propositions of Value," Journal of the American Forensic Association, 14 (1978), 194-204. My catagory of psychological presumption includes Matlon's second and third catagories--popular belief and judges' belief.

Matlon's first catagory--presumption resting against the resolution--is similar to my final catagory. Matlon doesn't deal with status quo presumption.

[8]Austin Freeley, Argumentation and Debate: Reasoned Decision Making, fifth ed. (Belmont: Wadsworth, 1981), p. 36.

[9]"Insane on All Counts," p. 22.

[10]"A Controversial Verdict," Newsweek, 5 July 1982, pp. 30-31.

[11]Warnick, p. 113.

[12]Sproule, p. 116.

[13]Raymond (Bud) Zeuschner and Charlene Arnold Hill, "Psychological Presumption: Its Place in Value Topic Debates," in Contributions on the Philosophy and Practice of CEDA, ed. Don Brownlee (Long Beach, Calif: Cross Examination Debate Association, 1981), p. 23. Emphasis added.

[14]Zeuschner and Hill, p. 23.

[15]Freeley, p. 263.

[16]David Zarefsky, "Argument as Hypothesis-Testing," unpublished paper presented at the Speech Communication Association convention, San Francisco, California, 28 December 1976, p. 5.

[17]Jan Vasilius, "Presumption, Presumption, Wherefore Art Thou Presumption?" in Perspectives on Non-Policy Argument,

ed. Don Brownlee (Long Beach, Calif: Cross Examination Debate Association, 1980), p. 35. See also Randolf J. Scott and Tony Wynn, "Avoidance of the False Claim: Some Considerations for Debating and Judging Propositions of Value," in Contributions on the Phiosophy and Practice of CEDA, pp. 26-27.

[18]Gary Cronkhite, "The Locus of Presumption," Central States Speech Journal, 17 (1966), 273.

[19]Paul Watzlawick, How Real is Real? Confusion, Disinformation, Communication (New York: Random House [Vintage Books], 1976), p. 62.

[20]Whately, p. 114.

[21]"Donovan: 'Insufficient Evidence,'" Time, 12 July 1982, p. 11.

[22]Wayne Brockreide, "Where is Argument?" Journal of the American Forensic Association, 9 (1975), 181.

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